OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-22-001

Re: Department of Economic Growth, Tourism and Culture

Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron

January 14, 2022

Summary: An applicant requested access to all records of a former employee of the Public Body that were exchanged with a named employee of another public body, or that mentioned a named former employee of a third public body, for a two-month period in 2015.

The Public Body provided the applicant with responsive records, but withheld one record over which the Public Body claimed legal privilege, pursuant to section 25 of the *Freedom of Information and Protection of Privacy Act* (the *"FOIPP Act"*). The applicant objected to the Public Body's claim of legal privilege on the grounds that none of the parties named in the access to information requests were lawyers, and requested a review of the Public Body's decision to withhold the record under section 25 of the *FOIPP Act*.

The Commissioner found that the Public Body was authorized to refuse to disclose the record under clause 25(1)(a) of the *FOIPP Act* and confirmed the decision of the Public Body to withhold the record from the responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 1, 4, 7, 25, 65.

Cases Cited: *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555

Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC)

Solosky v. *The Queen* 1979 CanLII 9 (SCC)

Calgary (Police Service) v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII)

Alpheus Brass et al v. *Her Majesty the Queen et al*, 2011 FC 1102 (CanLII)

Canada (Public Safety and Emergency Preparedness v. *Canada (Information and Privacy Commissioner)*, 2013 FCA 104 (CanLII)

Alberta (Municipal Affairs) v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 (CanLII)

I. BACKGROUND:

[1] An applicant (the "Applicant") made an access to information request to the Department of Economic Growth, Tourism and Culture (the "Public Body"), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act,* R.S.P.E.I. 1988, Cap. F-15.01 (the "*FOIPP Act*") over a period of three days in 2019. The Applicant requested:

> "All records, in any formats, electronic or otherwise, of [*named former employee of the Public Body*] which were either sent to – or received from – [*named employee of 2nd public body*] or make mention of [*named former employee of 3rd public body*], from April 15, 2015 to June 15, 2015."

[2] The Public Body located and retrieved five pages of responsive records. The Public Body released four pages to the Applicant in full but withheld a one-page record pursuant to clause 25(1)(a) of the *FOIPP Act*, claiming that the record was subject to solicitor-client privilege.

[3] The Applicant objected to the Public Body withholding the record pursuant to clause 25(1)(a) of the *FOIPP Act*, and sought a review of the Public Body's decision, stating: "Given that none of the parties are lawyers, I am challenging this provision."

[4] Former Commissioner Rose invited submissions from the parties. The Public Body provided submissions, but opted not to provide the record, which is their right in cases where solicitor-client privilege is claimed. Although subsection 53(2) of the *FOIPP Act* gives the Commissioner the authority to require production of records for examination, the Supreme Court of Canada has instructed that it does not apply to records over which solicitor-client privilege is claimed unless the legislation specifically states the Commissioner may require the production of records over which solicitor-client privilege is claimed (see: *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555).

[5] Former Commissioner Rose acknowledged that the Public Body was not required to produce the record to our office, however she requested the Public Body provide detailed evidence for the purpose of assessing their claim under clause 25(1)(a) of the *FOIPP Act*. The Public Body provided a schedule and an Affidavit in support of their clause 25(1)(a) claim in respect of the record, but requested both be received and considered *in camera* [in private]. Former Commissioner Rose agreed to the request and accepted the schedule and Affidavit *in camera*. The Public Body's submissions were provided to the Applicant, without the *in camera* schedule and Affidavit, and the Applicant was invited to make reply submissions. The Applicant elected not to provide a reply and submissions were closed.

II. RECORDS IN ISSUE

[6] The only record in issue is the one-page record over which the Public Body claimed solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act*.

III. JURISDICTION

[7] I am satisfied that the record in issue is a "record" as defined under section 1 of the *FOIPP Act*, and that it was in the custody and control of the Public Body, and that the *FOIPP Act* applies to it, pursuant to section 4 of the *FOIPP Act*. Therefore, I am satisfied I have jurisdiction in this matter.

IV. ISSUES

[8] There is only one issue in this review: whether the Public Body applied section 25 of the *FOIPP Act* appropriately in deciding to withhold the record in issue.

V. BURDEN OF PROOF

[9] The *FOIPP Act* assigns the burden of proof depending on what provision is in issue. Section 65 of the *FOIPP Act* describes who bears the burden of proof during an inquiry and states, in part:

> 65.(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.
>
> (2) Notwithstanding subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
> …

[10] As this review is in relation to a decision of the Public Body to refuse access to a record for a reason other than personal privacy of a third party, the burden of proof in this review rests with the Public Body.

VI. ANALYSIS

Did the head of the Public Body properly apply clause 25(1)(a) of the FOIPP Act to the record in issue?

[11] The Public Body claims the record in issue is subject to solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act* and has refused the Applicant access to the record. Clause 25(1)(a) of the *FOIPP Act* states:

> 25. Privileged Information
>
> (1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;
> …

[12] The Applicant objected to the Public Body's refusal to disclose the record in issue and challenged their claim of solicitor-client privilege.

[13] As this inquiry relates to the decision of the head of the Public Body to refuse the Applicant access to a record, it is up to the Public Body to show that they have properly applied clause 25(1)(a) of the *FOIPP Act*, and that the Applicant has no right of access to the record in issue. The standard of proof the Public Body must meet is a balance of probabilities. In other words, the Public Body must persuade me that it is more likely than not that they applied clause 25(1)(a) of the *FOIPP Act* appropriately.

[14] In matters where legal privilege is claimed, the Commissioner's job as an independent reviewer is more challenging because a public body is not required to produce the

records over which solicitor-client privilege is being claimed, to review and verify the public body's claim.

[15] As former Commissioner Rose noted in Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), at paragraph 81:

> "[81] The Public Body's affidavit evidence requires consideration. However, that does not mean that the Commissioner must accept the claim of the Public Body without testing it. Without the records to review, the Commissioner's job is more challenging than simply reviewing the records and determining whether the *Solosky* test is satisfied. The Commissioner must consider the exception and the context, and must rely upon the submissions and evidence offered by the Public Body."

[16] As mentioned earlier, the Public Body chose not to produce to our office the record over which they claimed solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act*. The Public Body, however, provided submissions regarding their claim of solicitor-client privilege, and an affidavit of the head of the Public Body to support their submissions. The affidavit included a Schedule "A" setting out the number of pages of the record (one), the type of privilege being claimed (solicitor-client privilege), and a brief description in general terms of the record and the nature of its contents. The Public Body's submissions also included a schedule which discussed the affidavit and provided submissions with more specific information about the contents of the record. Because the Public Body requested that the Affidavit and the schedule to the submissions be kept *in camera*, and former Commissioner Rose agreed, neither the affidavit, including Schedule "A", nor the schedule to the submissions were provided to the Applicant.

[17] The only submission the Applicant has made in support of their objection to the Public Body's claim of solicitor-client privilege is their statement that none of the parties named in the access request were lawyers. This is not surprising, given the circumstances. Applicants generally do not have much to go on when it comes to providing submissions in cases where the review relates to a Public Body's decision to

claim solicitor-client privilege over a record. Records over which solicitor-client privilege is claimed are typically withheld from an applicant in their entirety, so applicants have little or no information about the content or context of the records. This makes it rather difficult to make detailed or specific submissions in relation to a public body's decision.

[18] In the present matter, the Public Body withheld the record in issue in its entirety, so the Applicant had no opportunity to review the surrounding context. In addition, because the Affidavit and the supplementary submissions were received *in camera*, this information was not provided to the Applicant either. This means the Applicant had little detail about the basis of the Public Body's claim, only that the record was solicitor-client privileged, and the Public Body's discussion of the law as it applies to solicitor-client privilege in access to information matters. This left little for the Applicant to go on for the purpose of formulating submissions.

[19] However, as the burden of proof is on the Public Body to persuade the Commissioner that their claim of solicitor-client privilege is substantiated, it is the Public Body's responsibility to make this case, not the Applicant's.

[20] The Public Body's main submission in support of its decision was the test set out by the Supreme Court of Canada in *Solosky* v. *The Queen* 1979 CanLII 9 (SCC), which is one of the leading Canadian decisions on solicitor-client privilege. In that case, the Supreme Court of Canada set out a three-part test for determining if a document meets the criteria for solicitor-client privilege, namely:

> (a) there must be a communication between a solicitor and their client;
> (b) the communication must entail the seeking or giving of legal advice; and
> (c) the communication must be intended to be confidential by the parties.

[21] These criteria, generally known as the *Solosky* test, are the starting point for determining if solicitor-client privilege attaches. There have been many subsequent decisions in Canada that have elaborated upon and expanded the criteria described in

the *Solosky* test.

[22] One such decision, which is relevant to the present matter, is *Calgary (Police Service)* v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII), in which the Honourable Mr. Justice R.J. Hall stated at paragraph 6:

> [6] Having heard counsel's submissions and reviewed relevant case law, I have determined, in this case, that the appropriate test for privilege in respect of each of the disputed records, is as follows:
>
> 1) Is there a communication between a solicitor and a client?
> 2) Does the communication entail the seeking, giving or receiving of legal advice?
> 3) Is the communication intended by the parties to be confidential?
> 4) Is the lawyer acting as a lawyer?
> 5) What was the purpose for which the records came into existence?
> 6) Is the particular communication part of a continuum in which legal advice is given?
> 7) Does the particular communication reveal that legal advice has been sought or given?
> 8) If there is any privileged information, can it be reasonably severed from the rest of the record, without revealing the privilege?

[23] The provisions found in Alberta's legislation are substantially similar to those found in our *FOIPP Act*. I consider the additional criteria for consideration set out by the Honourable Mr. Justice R.J. Hall to be relevant considerations in this matter, as well. I do note that the Court in *Calgary (Police Service), supra,* had the records before them to review, which is not the case in the present matter. As a result, I was not able to assess some of these questions.

[24] As mentioned earlier, the Applicant's only submission was that none of the parties named in the access request were lawyers, so solicitor-client privilege cannot apply. With respect, solicitor-client privilege is not that narrow. It is not necessary that the communication be a direct communication between a lawyer and their client. A document can be solicitor-client privileged in some circumstances even if it is not a direct communication between a lawyer and a client.

[25] One example of such circumstances would be if a client is a group, comprised of more than one individual. Members of the client group exchanging documents that discuss legal advice which was given by a lawyer representing the client would qualify for solicitor-client privilege. Solicitor-client privilege may also apply to internal documents of a public body which reference or discuss a lawyer's legal advice (see: *Alpheus Brass et al* v. *Her Majesty the Queen et al*, 2011 FC 1102 (CanLII), at paragraph 75).

[26] Solicitor-client privilege will also apply to communications that reveal the advice sought or received from the lawyer, which include background documents provided by the client to legal counsel to assist legal counsel in formulating and giving advice, or factual assumptions on which legal advice is sought or given. It can also include memos from a client's employee forwarding enclosures which indicate how a client may be directing their lawyer.

[27] In *Canada (Public Safety and Emergency Preparedness* v. *Canada (Information and Privacy Commissioner)*, 2013 FCA 104 (CanLII), the Federal Court of Appeal discussed the continuum and stated at paragraphs 26 and 27:

> [26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band* v. *Canada*, 1995 CanLII 3602(FCA), [1995]2 F.C. 762 at paragraph 8.
>
> [27] Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel* v. *Air India* [1988] 2 W.L.R. 1036 at page 1046 per Taylor L.J.; *Three Rivers District Council* v. *Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 11.

[28] In a more recent case, *Alberta (Municipal Affairs)* v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 (CanLII), the Honourable Mr. Justice Mandziuk reviewed whether it is necessary for a communication to be directly between a lawyer

and client to constitute a "continuum of legal advice", and stated at paragraphs 17 and 18:

> [17] There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> [18] Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": *Calgary (Police Service)* at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: *Bank of Montreal v Tortora*, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[29] The Public Body acknowledges that the record in issue is not a direct communication between the Public Body and its lawyer, but submits it falls within a continuum of communications that relays information about the giving or seeking of legal advice. The Public Body further submitted that their submissions, including the *in camera* schedule with more specific submissions, and the Affidavit of the head of the Public Body provided sufficient description and information to provide clear and cogent evidence that the 3-part *Solosky* test has been met, remarking:

> "Communications between lawyers and their clients and those within the continuum of solicitor-client communications are appropriately afforded protection available as a result of solicitor-client privilege. The evidence provided clearly and sufficiently indicates and informs you that the Record fits within the claim of privilege, a claim that has not been waived."

[30] I am unable to provide much detail about how the various criteria were applicable, because I would risk disclosing details about the *in camera* information. I examined the criteria set out in *Solosky* and *Calgary (Police Services)* and applied the relevant criteria to the information provided by the Public Body to our office *in camera* regarding the nature and contents of the record in issue. While the Applicant is correct in that none of the parties named in the request for access to information were lawyers, based on

the *in camera* information provided for the purposes of assessing the Public Body's claim of solicitor-client privilege, I am satisfied that the record is of a nature that would qualify as a communication within a continuum of legal advice which may reveal the advice sought or received from a lawyer.

[31] After having considered the criteria and the information provided by the Public Body, I am persuaded that the record in issue meets the threshold required for solicitor-client privilege to attach.

[32] As outlined earlier, the Public Body need only establish on a balance of probabilities that the record in issue is subject to solicitor-client privilege. If the Public Body establishes that it is more probable than not that the record in issue is subject to solicitor-client privilege, it is then in the sole discretion of the Public Body to withhold that record.

[33] For the reasons stated above, I am satisfied on a balance of probabilities that the Public Body's assessment that the record in issue is subject to solicitor-client privilege is valid.

VII. FINDINGS

[34] Based on the above, I find that the Public Body has appropriately applied clause 25(1)(a) of the *FOIPP Act* to the record in issue. I find therefore that the Public Body is authorized to refuse to disclose the record in issue to the Applicant.

VIII. ORDER

[35] I confirm the decision of the Public Body to withhold the one-page record of the responsive records pursuant to clause 25(1)(a) of the *FOIPP Act*.

[36] I thank the parties for their submissions in this matter.

[37] In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, an application for judicial review of the Order may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

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Denise N. Doiron
Information and Privacy Commissioner